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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 288.

IN THE MATTER OF THE DETERMINATION OF GOOD MORAL CHARACTER OF MICHAEL ZIPKIN.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri.

BRIEF OF RESPONDENT IN OPPOSITION.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement	3
Argument	7
I. The decision below is clearly correct and depends solely upon a factual determination involving the credibility of witnesses	7
II. The decision below presents no important question of federal law and does not conflict with any decision of this Court	9
Conclusion	11

CITATIONS.

Cases:

Ex parte Williams, 277 U. S. 267 (1928)	9
In re Anastapalo, 366 U. S. 82 (1961)	11
Konigsberg v. State Bar of California, 353 U. S. 252 (1957)	10
Konigsberg v. State Bar of California, 366 U. S. 36 (1961)	11
Merchants' Warehouse Co. v. United States, 283 U. S. 501 (1931)	9
National Labor Relations Board v. Donnelly Garment Co., 330 U. S. 219 (1947)	9

Phillips v. Commissioner of Internal Revenue, 283 U. S. 589 (1931) 9
Schware v. Board of Bar Examiners, 353 U. S. 232 (1957) 10
S. E. C. v. Central-Illinois Securities Corp., 338 U. S. 96 (1949) 9

United States Constitution:

Amendment 14 2

Statute and Rule:

28 U. S. C. 1257 2
Rule 8 of the Supreme Court of Missouri 8

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OPINIONS BELOW.

The order of the court below is unreported and is set out in full at page A1 of the Petition. The findings and order of the State Board of Law Examiners are unreported and are set out at pages A2-A15 of the Petition.

JURISDICTION.

The order of the Supreme Court of Missouri was entered on April 16, 1961. A motion for rehearing was denied on May 8, 1961. The jurisdiction of the Court is invoked under 28 U. S. C. 1257.

QUESTION PRESENTED.

Whether, where there is a direct conflict of evidence on a material point, it is a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution for a State administrative tribunal to believe one witness and disbelieve another.

CONSTITUTIONAL PROVISION INVOLVED.

Section 1 of the Fourteenth Amendment of the United States Constitution provides in pertinent part as follows: "No State shall . . . deprive any person of life, liberty or property without due process of law."

STATEMENT.

Petitioner graduated from Missouri University School of Law in June, 1960, and took the Missouri State Bar Examination that same month, but did not pass. While the Board of Law Examiners was still in the process of grading the examination papers, a member of the Board received a complaint from a member of the Missouri Bar that petitioner had held himself out as an attorney and had attempted to influence the testimony of witnesses in a hearing pertaining to charges of unprofessional conduct of a Missouri psychiatrist, one Dr. Freeman. Petitioner had previously been found to be of good moral character by the Missouri Bar Committees for the Sixteenth and Thirty-fourth Circuits, and this was the first complaint the Board had received about petitioner (Petition, Appendix B, pages A2-A3).

The Board decided to complete the grading of applicant's examination paper, along with the papers of all other applicants, to see whether he passed before proceeding further. Petitioner failed the Bar Exam and was so notified on September 13, 1960. He was advised at that time that if he desired to take a second Bar Examination, it would be necessary for the Board to investigate further the matter of petitioner's character and hold a hearing thereon. Petitioner advised the Board that he did intend to take a second Bar Examination in February, 1961. On October 4, 1960, petitioner was advised that a hearing on the question of whether he met the requirement of good moral character would be held on October 21, 1960. Prior to the hearing, the Board advised petitioner that the hearing would be particularly directed to the questions of whether petitioner had held himself out as a member of the Bar and whether he had attempted to influence the testimony of a witness in connection with the

Dr. Freeman hearing. Petitioner was provided with names of the witnesses the Board intended to subpoena in regard to the charges, and he was advised that he could present witnesses, request issuance of subpoenas and be represented by counsel (Petition, Appendix B, pages A3-A5).

The hearing before the Board was held on October 21, 1960, as scheduled, and petitioner was present in person and represented by an attorney. At the hearing, the main witness who testified against petitioner was Michael J. Trombley, a young attorney from Columbia, Missouri. Trombley testified that he and his wife employed a housekeeper by the name of Irene Weirhake who was under treatment by Dr. Freeman. She was advised that she was to appear as a witness against Dr. Freeman in the hearing to be conducted about his alleged professional misconduct. She was confused and asked Trombley what she should do. Trombley advised her to tell the truth, and she then advised Dr. Freeman that she was going to testify and was going to tell the truth. Dr. Freeman told her that this would not be the wise thing to do. (Petition, Appendix B, pages A-6-A7, and see Volume I [R-I] of the transcript of the hearing at pages 3, 9, 10.) Trombley testified that shortly thereafter petitioner called the Trombleys and said that he was helping Dr. Freeman with his case and that while things were going well, there was a problem because Irene Weirhake was in a "truth telling mood" and that he felt that the Trombleys should meet with petitioner and Dr. Freeman to see what could be done about Mrs. Weirhake. (Petition, Appendix B, pages A6-A7, and R-I 3, 4, 5, 6, 10.) Trombley testified that he asked petitioner whether he was trying to intimidate a witness and petitioner replied that it would be best for everybody if they all met and decided what to do with Mrs. Weirhake (R-I 5).

Petitioner testified that he had been a patient of Dr. Freeman's since approximately December, 1958, when he

was introduced to the doctor by Mr. and Mrs. Trombley. With regard to the telephone conversation, petitioner denied that he said anything about Irene Weirhake being in a "truth telling mood," but he admitted making the call and gave two different versions of his reason for making it. He first testified that he called Mr. and Mrs. Trombley because he had heard that Mrs. Weirhake was going to accuse Dr. Freeman of rape or sexual immorality and he wanted "to inform them of this" (R-I, 25-26). His first version of the telephone conversation was that he told the Trombleys that "I just heard Irene Weirhake is going to accuse Dr. Freeman of rape and I wanted to tell you about this because if Irene gets into a mess she is just liable to drag you into it" (R-I, 25). Later in his testimony, however, petitioner stated that he called "the Trombleys simply to tell them that I had heard Irene was going to testify, I didn't know what to." He stated that he told the Trombleys only that he heard that Mrs. Weirhake was going to testify against Dr. Freeman, that he "didn't hear what about or what the charges were," that he "had no idea" about what Irene was going to testify to at the hearing, and that he "did not tell (the Trombleys) that (he) had . . . heard that she was going to testify that she had been raped by Dr. Freeman" (R-I, 50, 51, 54, 58). Petitioner also made other inconsistent statements on other points during his testimony.[1]

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[1] Petitioner testified that the "end of the friendship (with the Trombleys) was some time in 1959 as best I can tell" at one point in his testimony (R-I, 46), and yet he also testified that when he made the phone call to the Trombleys in the Spring of 1960, he was "under the impression that Mr. and Mrs. Trombley were still my friends" (R-I, 25). Also, petitioner testified that he understood that the Trombleys were instrumental in getting Mrs. Weirhake to testify and that they already knew about her being involved in the hearing when he called them (R-I, 27, 37), but he also testified that he called them because he did not think they knew that Mrs. Weirhake was going to testify (R-I, 50). Although there may possibly be some conceivable way in which to explain away these apparent inconsistencies (see Petition at page 26, foot-

The Board, one member dissenting, held that petitioner had not satisfied his burden of proving that he was of good moral character and it therefore denied him permission to take a written examination to practice law.[2] The Board based this decision on its finding that petitioner attempted to influence the testimony of Irene Weirhake by approaching Mr. and Mrs. Trombley with the suggestions as testified to by Trombley, and on its further finding that petitioner did not tell the truth in his testimony before the Board either as to what he said in the telephone conversation with the Trombleys or as to whether or not he had heard prior to the time of the phone conversation that Irene was going to testify as to sexual relations with Dr. Freeman (Petition, p. A8).

As the Board recognized, the testimony of Trombley and petitioner was irreconcilable (Petition, p. A11). Faced with the inconsistencies in petitioner's own testimony, and perhaps influenced by the demeanor of petitioner when he testified, the Board concluded that Trombley's version of what was said in the telephone conversation was correct and that petitioner was not telling the truth in his testimony before the Board.

On appeal to the Supreme Court of Missouri, that Court found the Board's findings were "supported by competent and substantial evidence on the whole record," and it therefore affirmed the findings and order of the Board of Law Examiners (Petition, p. A1).

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note 18), the statements made by petitioner are basically inconsistent and certainly the Board finding that they were inconsistent was warranted from petitioner's testimony.

[2] The Board found in favor of petitioner on charge that he held himself out as an attorney (Petition Appendix B, pp. A8-A10).

ARGUMENT.

I.

The decision below is clearly correct and depends solely upon a factual determination involving the credibility of witnesses.

The decision below is clearly correct. Trombley testified unequivocally that petitioner called him and Mrs. Trombley on the telephone, told them that Irene Weirhake was in a "truth telling mood," and suggested that they should get together with him and Dr. Freeman to see if they could do something about this. The Board of Bar Examiners found the facts to be as Trombley had testified and concluded that because of this attempt on the part of the petitioner to influence the testimony of Mrs. Weirhake and because of petitioner's untruthful statements to the Board, petitioner had not made a sufficient showing of good moral character.

Petitioner, of course, denied the statements attributed to him by Trombley, but in so doing, he completely changed his testimony before the Board within the space of a few short minutes. Thus, in the early part of petitioner's testimony he stated that he told the Trombleys in the telephone conversation that he "just heard Irene Weirhake is going to accuse Dr. Freeman of rape and I wanted to tell you about this because if Irene gets into a mess she is just liable to drag you into it" (R-I 26). Realizing that his knowledge at the time of the telephone conversation of what Mrs. Weirhake was going to testify to at the hearing could show a motive for petitioner, in view of his close association with Dr. Freeman, to call the Trombleys in order to attempt to change Mrs. Weirhake's testimony, petitioner later turned full circle and testified

that he did not know what Irene was going to testify to when he called the Trombleys, that he "did not hear what Irene was going to say", that all he had heard was that Irene was going to testify against Dr. Freeman, that he "had no idea" what her testimony would be and that the only information he gave to the Trombleys was that he simply heard that Irene was going to testify at the hearing and that he did not know what about (R-I 50, 51, 54, and 58). So, while petitioner first testified that he told the Trombleys that "Irene Weirhake is going to accuse Dr. Freeman of rape" (R-I 26), he later recanted and testified that he "did not tell (the Trombleys) that (he) had . . . heard that she was going to testify that she had been raped by Dr. Freeman or words to that effect" (R-I 58). Faced with this complete about-face in testimony by petitioner within the space of a few minutes about such a material fact, the Board was clearly justified in believing Trombley and not the petitioner. And the Supreme Court of Missouri was correct in holding, after a full review of the transcript, the records and the files in the case, that the findings by the Board were "supported by competent and substantial evidence".

The Board of Law Examiners is a state administrative tribunal created under Rule 8 of the Rules of the Supreme Court of Missouri. It is the duty of the Board to investigate and determine the moral fitness of applicants to take the Missouri Bar examination, and the burden of establishing eligibility rests on the applicant (Rule 8.07, Supreme Court Rule; Volume IV of the Missouri Revised Statutes, 1959). Basically, as the extended factual discussion in the petition shows (pages 19-27), the decision below involves only a determination of fact by the Board. This factual dispute was resolved against petitioner and there is no basis for a judicial review of the factual decision here. Findings of fact for ordinary administrative purposes are not subject to review but are accepted as

conclusive by this Court. See **Phillips v. Commissioner of Internal Revenue**, 283 U. S. 589, 600 (1931); **SEC. v. Central-Illinois Securities Corporation**, 338 U. S. 96, 126 (1949); **Ex parte Williams**, 277 U. S. 267, 272 (1928). Particularly this is true where the question before the administrative tribunal is solely one of credibility of witnesses. As this court pointed out in **Merchants' Warehouse Co. v. United States**, 283 U. S. 501, 508 (1931), "the credibility of witnesses and weight of evidence are for the commission and not for the courts, and its findings will not be reviewed here if supported by evidence." See also **National Labor Relations Board v. Donnelly Garment Company**, 330 U. S. 219, 231 (1947). The only question in the case at hand is one of credibility of witnesses. The Board chose to believe one witness and disbelieve another. That decision is not subject to review here.

II.

The decision below presents no important question of federal law and does not conflict with any decision of this court.

There is no important federal issue involved in this case. The only question present is the factual one of whether petitioner satisfied the Board of Law Examiners that he was a person of good moral character. On that issue the witness Trombley testified that petitioner called Trombley and his wife and told them that he was helping Dr. Freeman with his case but there was a problem because Irene Weirhake was in a "truth telling mood" and that the Trombleys should get together with petitioner and Dr. Freeman to see what could be done about this. The Board specifically found that this conversation did occur, and in view of this apparent attempt to influence a witness' testimony, and in view of petitioner's changing of his testimony at the hearing, the Board was not willing

to certify petitioner as a person of good moral character. In the face of the findings of fact in this case, the Board could hardly do otherwise.

Petitioner's reliance on the decisions of this Court in **Schware v. Board of Bar Examiners**, 353 U. S. 232 (1957), and **Konigsberg v. State Bar of California**, 353 U. S. 252 (1957), is completely misplaced. Those cases involved the problem of the reconciliation of the federally protected rights of freedom of association and speech guaranteed by the First Amendment with the right of a state to determine the qualifications of the members of its bar. No free speech problem is involved here. The case simply involves the right of a Board of Law Examiners to believe one witness and disbelieve the other, and respondent is aware of no decision of this Court—and, indeed, none is cited by petitioner—holding that an applicant for admission to practice law has a constitutional right to be believed when his testimony conflicts internally and is in direct conflict with that of another credible witness.

Petitioner contends that, as in **Schware** and **Konigsberg**, there is no evidence in the record which supports a finding of doubt about petitioner's character. Unlike **Schware** and **Konigsberg**, however, there was here direct evidence that petitioner had called the Trombleys on the telephone and attempted to try and do something about Mrs. Weirhake's "truth telling mood." As the Supreme Court of Missouri held in this case, this was "competent and substantial evidence" supporting the findings of the trier of the facts. In **Schware** and **Konigsberg**, on the other hand, there not only was no competent substantial evidence to support the findings of the Board, there was no evidence at all to support those findings.

This Court has had occasion recently to review the scope of the decisions in **Schware** and **Konigsberg**. In the latest

Konigsberg decision, it was pointed out that in the first Konigsberg case all the other evidence in the record could not, even with the aid of all reasonable inferences flowing therefrom, cast such doubts upon petitioner's prima facie case as to justify any finding other than that these two California qualification requirements (good character and non-advocacy of violent overthrow) had been satisfied." 366 U. S. 36, 42 (1961). In the case at hand, the evidence in the record, even without the aid of any reasonable inferences, directly sustains the finding of the Board that petitioner tried to influence the testimony of Mrs. Weirhake and had changed his own testimony, and that therefore he had not shown that he was of good moral character. Moreover, as this Court pointed out in **Re Anastapalo**, 366 U. S. 82, 97 (1961), the function of this Court "is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were another state court of review, still less to express any view upon the wisdom of the state's action." Petitioner here asks not for a constitutional adjudication, but that this court pass judgment on the decision of the Board of Law Examiners and the Supreme Court of Missouri and that it set aside findings of fact supported by competent evidence and replace them with a finding favorable to petitioner. Such a request by petitioner fails to show an "appropriate regard for the limited range" of this Court's authority. **In re Anastapalo**, 366 U. S. 82, 97 (1961). The short of the matter is that petitioner has no constitutional right that he be believed and that another be disbelieved.

CONCLUSION.

The decision below involves only a factual dispute turning on the credibility of witnesses, and the findings of the Board of Law Examiners were correct and clearly supported by competent evidence. There is no important

question of federal law involved in this matter, and there is no conflict with any decisions of this Court. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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